IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

NOTICE OF MOTION NO. 1899 OF 2004
IN
APPEAL NO.84 OF 1999
IN
NOTICE OF MOTION NO.3208 OF 1996
IN
SUIT NO.4118 OF 1996

Colgate Palmolive Company & Anr. Appellants

vs.

Anchor Health & Beauty Care Private Limited Respondents

Dr. Virendra Tulzapurkar, senior counsel with Mr.M.I.Chagla i/b. M/s.Bharat Shah & Co. for the appellants.

Mr.R.M. Kadam with Ms.J. John i/b. Mr.M.P.Savla for the respondents.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 15th October 2004

ORAL ORDER (Per R.M. Lodha,J.)

By this notice of motion taken out by the appellants it is prayed that the appellants be permitted to tender additional evidence marked Annexure '1' to Annexure '27' along with the affidavit of Dinesh Castellino dated 28th June 2004.

2. The learned senior counsel for the appellants as well as the learned counsel for the respondents wanted us to hear and decide this application for additional

evidence before the hearing of the appeal. Ordinary the legitimate occasion for consideration of the application for production of additional evidence under Order 41 rule 27 should be when the appeal is heard but since the learned counsel for the appellants as well as the learned counsel for the respondents wanted this application to be heard first before the appeal was heard, we took up the notice of motion for hearing.

3. We, therefore, have to consider whether the appellants may be permitted to tender additional evidence as sought for.

4. The appeal in which the application for additional evidence is made arises out of the order dated 5th October 1998 whereby the learned motion Judge declined to grant order of temporary injunction in the suit filed by the plaintiffs for infringement of copyright and passing off action.

5. This application for production of additional evidence is admittedly made under Order 41, Rule 27 of the Code of Civil Procedure.

> "**27. Production of additional evidence in Appellate Court. - (1)** The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

6. The scope of the provision contained in Order 41, Rule 27 is well known. Since few judgments were cited on the subject, without multiplying the authorities, we may refer to one judgment of the Supreme Court in the case of Mahavir Singh & ors. v. Naresh Chandra & Anr., (2001) 1 S.C.C.309 wherein the Supreme Court observed thus:

"5. Before we proceed further we would like to refer to the scope of an application under Order 41 Rule 27 CPC. Section 107 CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order 41 Rule 27 CPC. The principle to be observed ordinarily is that the appellate court should not travel

outside the record of the lower court and cannot take evidence on appeal. However, section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order 41 Rule 27 CPC was examined by the Privy Council in Kessowji Issur v. Great Indian Peninsula Rly. Co. in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no jurisdiction to admit such evidence in cases where this rule does not apply. Order 41 Rule 27 CPC envisages certain circumstances when additional evidence can be adduced:

> (i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
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> (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
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> (iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

In the present case, it is not the case of either party that the first situation is attracted. So far as the second circumstance noticed above is concerned, question of exercise of due diligence would not arise because the scientific equipment concerned from which examination is sought to be made itself was not in existence at the time of

> trial and so that clause is also not attracted. In the third circumstance, the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce the judgment, or for any other substantial cause. The expression "to enable it to pronounce judgment" has been the subject of several decisions including Syed Abdul Khader v. Rami Reddy wherein it was held that when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence (see: Municipal Corpn. of Greater Bombay v. Lala Pancham). But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule. The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in Kessowji Issur v. G.I.P. Rly. It is under these circumstances such a power could be exercised."

7. The learned senior counsel for the appellants-applicants submitted that the additional evidence which is sought to be tendered by the appellants is relevant for disposal of the appeal. He would urge that the said documents came into existence subsequent to the impugned order and for doing complete justice between the parties, the additional evidence is necessary. The learned senior counsel relied upon clause (b) of sub-rule (1) of Rule 27, Order 41,

particularly clause " or for any other substantial cause" in this regard. Relying upon the two decisions of this Court in the case of M/s.Hiralal Prabhudas v. M/s.Ganesh Trading Company & ors., AIR 1984 Bom.218 and National Chemicals & Colour Co. & ors. v. Reckit & Coloman of India Ltd. & Anr., AIR 1991 Bom.76, the learned senior counsel submitted that the impugned order cannot be termed as a discretionary order since the learned motion Judge prima facie adjudicated that the product of the defendant was not deceptively similar to that of plaintiffs and based on that finding, interim relief was declined to the appellants. The learned senior counsel would submit that the exercise of discretion could arise only if the learned motion Judge had decided in favour of the plaintiffs the prima facie case and then declined to grant interim relief for some reason.

8. The order passed by the Court under Order 39, Rules 1 and 2 CPC is discretionary is well known. In Dalpat Kumar & Anr. v. Prahlad Singh & ors., AIR 1993 SC 276, it was held that grant of injunction is a discretionary relief. The exercise of discretion in the matter of interim relief is subject to the court satisfying that there is a serious disputed question to be tried in the suit and that on the facts before the court, there is probability of his being entitled to the relief asked

for by the plaintiff/defendant and that the court's interference is necessary to protect the party from the species of injury. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1, the Supreme Court observed thus:

> "24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:
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> (i) extent of damages being an adequate remedy;
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> (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;
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> (iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
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> (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;
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> (v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
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> (vi) balance of convenience or inconvenience ought to be considered

> as an important requirement even if there is a serious question or prima facie case in support of the grant;
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> (vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise."

9. The scope of the appeal preferred against the discretionary order in the matter of interlocutory injunction is also well established and if any authority is required we refer to the judgment of the Supreme Court in the case of Wander Ltd. & Anr. v. Antox India P. Ltd., 1990(Supp) SCC 727 wherein the Supreme Court held thus:

> "13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing off action is founded. We shall deal with these two separately.
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> 14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court

> will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph: (SCR 721)
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> > "...These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton '... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

10. Let us make it clear and we do that the impugned order declining to grant temporary injunction has not ceased to be discretionary order merely because the learned motion Judge did not find any prima facie case and accordingly refused to grant interim restraint order. In the matters of temporary injunction, the Court does not adjudicate on the subject matter or any part of it on merits. The Court considers the application for temporary injunction in the light of well known principles as already noticed above and then

exercises its discretion weighing all relevant consideration without any expression of opinion on merits of the matter. We hardly find the relevance of the two judgments of this Court namely M/s. Hiralal Prabhudas and National Chemicals and Colour Co. on the position we have noticed above.

11. In the appeal preferred by the appellant aggrieved by the order of the learned motion Judge declining to grant interim injunction shall have to be considered within the parameters laid down by the Supreme Court in the case of Wander Limited. Whether the learned motion Judge was right or not in passing the impugned order shall have to be seen in the light of the material placed before the learned motion Judge by the parties. With the limited jurisdiction that the appeal court has in the matter arising out of an application for temporary injunction, ordinarily the appeal court shall confine the consideration of the matter to the pleadings and material that were under consideration before the motion Judge. You cannot find fault with the discretionary order of the learned Judge by relying upon the material placed in appeal which was not under consideration at the time of consideration of application for temporary injunction and interfere with the discretionary order. The appeal court in an appeal

from discretionary order does not generally travel beyond the record of the lower Court. The aspects whether the respondent (the defendant) intends to trade on the reputation of the plaintiff and whether the adoption is dishonest by the defendant, in our view, has to be examined on the basis of the available material which the parties have placed on record. Moreover, the additional evidence, sought to be produced is not decisive and conclusive.

12. For all these reasons, we are satisfied that there is no justification for taking on record the additional evidence.

13. We, accordingly, dismiss the notice of motion.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)